Supreme Court, U.S.
FILED
OCT 24 1991
OFFICE OF THE CLERK

No. 91-434

In The Supreme Court of the United States
October Term, 1991

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated,

Appellants,

vs.

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the State Board of Election Commissioners, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and REPUBLICAN PARTY EXECUTIVE COMMITTEE,

Appellees,

and THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,

Appellees-Intervenors.

On Appeal From Decisions Of The Three-Judge Court Of The United States District Court For The Southern District of Mississippi

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

*CARROLL RHODES
P. O. Box 588
Hazlehurst, MS 39083
(601) 894-4323

DEBORAH McDONALD
Post Office Box 211
Fayette, MS 39069
(601) 786-8730

JOHN L. WALKER
Post Office Box 22849
Jackson, MS 39225-2849
(601) 948-4589

WILBUR O. COLOM
406 Third Avenue North
Columbus, MS 39703-0866
(601) 327-0903

JOHN PARKER
P. O. Box 808
Jackson, MS 39205-0808
(601) 352-8443

MIKE SAYER
119 Theobald Street
Greenville, MS 38701
(601) 334-6827

*Counsel of Record

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Authorities ..... ii-iii

Argument 1

I. This Court should not dismiss appellants' appeal 1

A. Because the Three-Judge District Court's Denial of Injunctive Relief Rested Upon Resoultion of the Merits of Appellants' Constitutional Calim and Interwoven Statutory Claims 1

B. The Instant Action is Not Moot 3

II. This Court should not affirm the orders of the District Court 4

A. Because the District Court Clearly Abused its Discretion 4

B. Appellants are Entitled to a Preliminary Injunction Under § 2 of the Voting Rights Act 6

C. The Election Law Changes Contained in the District Court's August 2, 1991 Order Reflect Policy Choices of the Elected Representatives of the People 6

Conclusion 7

TABLE OF AUTHORITIES

Cases:	Page Number
Berry v. Doles, 438 U. S. 190 (1978)	4, 6
Chapman v. Meier, 420 U. S. 1 (1975)	5
Chisom v. Roemer, 853 F. 2d 1186 (5th Cir. 1988)	2
Clark v. Roemer, ___ U. S. ___, 111 S. Ct. 2096 (1991)	4, 5, 6
Connor v. Finch, 431 U. S. 407 (1977)	5
Dougherty County Board of Educ. v. White, 439 U. S. 32 (1978)	6
Edge v. Sumter County School Dist., 775 F. 2d 1509 (11th Cir. 1985)	2, 5, 6
Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73 (1960)	3
Hathorn v. Lovorn, 457 U. S. 255 (1982)	6
Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989) *aff'd mem.*, ___ U. S. ___, 111 S. Ct. 662 (1991)	2, 5, 6
Jordan v. Winter, 541 F. Supp. 1135 (N. D. Miss. 1982) (three-judge court), *vaccated and remanded, sub. nom. Brooks v. Winter*, 461 U. S. 921 (1983)	3
McDaniel v. Sanchez, 452 U. S. 130 (1981)	6

MTM, Inc., v. Baxley,,
420 U.S. 799 1975..... 1

N.A.A.C.P. v. Hampton County Election Commission, 470 U. S. 166 (1985)..... 3

Perkins v. Matthews,
400 U. S. 379 (1971)..... 3, 6

Swann v. Adams,
385 U. S. 440 (1967)..... 5

United States v. Munsingwear,
340 U. S. 36 (1950)..... 4

Upham v. Seamon,
456 U. S. 37 (1982)..... 5, 6

Other Authorities:

42 U.S.C. Section 1973..... 6

42 U.S.C. Section 1973c..... 7

Fed. R. Civ. P. 65..... 3

ARGUMENT

I. THIS COURT SHOULD NOT DISMISS APPELLANTS' APPEAL

A. Because the Three-Judge District Court's Denial of Injunctive Relief Rested Upon Resolution of the Merits of Appellants' Constitutional Claim and Interwoven Statutory Claims.

Appellees erroneously argue that this Court is without jurisdiction to entertain the instant appeal. [Motion to Dismiss, pp. 8-11]. They rely heavily on this Court's holding in *MTM, Inc., v. Baxley,* 420 U.S. 799 (1975). That reliance is misplaced. In *MTM, Inc.*, a direct appeal was sought from a decision of a three-judge district court that "[w]ithout resolving the constitutional merits of the Complaint . . . dismissed the Complaint without prejudice." *MTM, Inc., v. Baxley*, supra at 800. This Court held that a direct appeal will lie "from the order of a three-judge district court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim..." *MTM, Inc., v. Baxley*, supra at 804.

The three-judge district court, in the instant case, resolved the constitutional and interwoven federal statutory (Voting Rights Act) claims adverse to appellants. The three-judge district court specifically held that "it is constitutionally permissible to utilize the 1982 plan in fashioning interim relief. [App. 39 to Juris. Stat.]. The lower court specifically resolved appellants' constitutional claims, and this appeal rests upon that resolution.

In addition to resolving the constitutional issues,

the three-judge district court resolved interwoven statutory issues upon which this appeal rests. The lower court held that "because this court is not adopting, or utilizing, the 1982 plan as a permanent plan[1], but for an interim period, plaintiffs do not satisfy the test for preliminary relief." [App. 45-46 to Juris. Stat.]. Contrary to appellees assertions [2], the only test for preliminary injunctive relief the three-judge district court found appellants had not met was the test of irreparable harm. The district court relied on the Court of Appeals for the Fifth Circuit's decision in *Chisom v. Roemer*, 853 F. 2d 1186 (5th Cir. 1988). This Court, just last term, affirmed a decision of a three-judge district court for the Eastern District of Arkansas, wherein the district court reiterated an earlier holding that "the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the [illegal] structure." *Jeffers v. Clinton*, infra, 730 F. Supp. at 202. The Court of Appeals for the Eleventh Circuit, in *Edge v. Sumter County School Dist.*, 775 F. 2d 1509, 1510 (11th Cir. 1985), held that a "district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act..." That court, in reaching its

[1]The three-judge district court recognized that the 1982 plan could not pass constitutional muster if it was to be utilized as a permanent plan. [App. 44 to Juris. Stat.]. However, the court held that the unconstitutional plan could be utilized as an interim remedy because, as the lower court erroneously found, the constitutionally acceptable alternative plans were "undesirable." [App. 44 to Juris. Stat.].

[2]Appellees erroneously argue that appellants did not prove: (1) irreparable harm; (2) a substantial likelihood of success on the merits; and (3) that geographically compact single-member districts could be created. Appellants offered unrebutted proof that: (1) 40 House and 13 Senate single-member black majority districts could be created; (3) blacks are politically cohesive; (4) white bloc voting is legally significant; (5) the extent of official discrimination; (6) socioeconomic disparities which adversely affect black voters; and (7) the extent of electoral success by blacks. Appellants proved a prima facie § 2 case. See *Jeffers v. Clinton*, 730 F. Supp. 196 (E. D. Ark. 1989) (three-judge court) *aff'd mem.*, ____ U.S. ____, 111 S. Ct. 662 (1991).

decision, relied on *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), *vacated and remanded, sub. nom. Brooks v. Winter*, 461 U. S. 921 (1983). The *Jordan* Court specifically held that "any plan adopted by this court *as a temporary method of ensuring upcoming elections cannot violate Art. 1, § 2*, the fourteenth amendment, *or the Voting Rights Act.*" *Jordan v. Winter*, supra, 541 F. Supp. at 1142 (emphasis supplied). The *Jordan* Court further held that "such a plan must satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Id.*, at 1142. The lower court's decision, to the contrary of this settled precedent, in the instant case, has started a disturbing trend at least within the Fifth Circuit. After the lower court rendered its decision, it has been virtually impossible for black and other protected minority voters to secure injunctive relief against apportionment plans that are constitutionally malapportioned and/or dilutive of minority voting strength. Fed. R. Civ. P. 65 has, in voting rights cases, been eviscerated. To settle the divergent views of lower courts, with respect to federal courts obligations to uphold the Voting Rights Act, this Court should note probable jurisdiction. Since the Voting Rights Act claim is so closely interwoven with appellants' constitutional claim, this Court has jurisdiction of those claims. See *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

B. The Instant Action is Not Moot.

Appellees erroneously argue that the instant appeal is moot. They argue that appellants' § 5 claim is moot because the primary elections were conducted on September 17, 1991. However, conducting primary elections in conceded violation of § 5 of the Voting Rights Act does not moot the instant case. Where, as here, unprecleared voting changes are implemented, the federal courts could set aside those elections conducted utilizing the unprecleared changes. See *Perkins v. Matthews*, 400 U. S. 379 (1971); *N.A.A.C.P. v. Hampton County Election Commission*, 470 U. S. 166 (1985);

Berry v. Doles, 438 U. S. 190 (1978); *Clark v. Roemer*, ____ U. S. ____ , 111 S. Ct. 2096 (1991). It is not the conducting of the election, in conceded violation of § 5 of the Voting Rights Act, that would moot appellants' challenge. Only preclearance of the voting change, or not implementing the change during the election, or not holding the election would moot appellants' § 5 challenge. None of the three mooting factors occurred. Therefore, appellants' § 5 claim is not moot, and the instant appeal is not moot.

Concerning appellants' constitutional and § 2 claims, those issues are not moot because the general election has not been held. That election is scheduled for November 5, 1991.[3] The unconstitutionally malapportioned and racially dilutive 1982 plan will be utilized, as ordered by the three-judge district court, for conducting the general election. The issues concerning the use of that plan to conduct the general election raised in this appeal are still alive. Even if the issues became moot while this appeal was pending, the proper course for this Court to follow would be to vacate the lower court's orders and opinions appealed from and to remand the case to the district court with instructions to dismiss the appeal as moot. *United States v. Munsingwear*, 340 U.S. 36 (1950).

II. THIS COURT SHOULD NOT AFFIRM THE ORDERS OF THE DISTRICT COURT

A. Because the District Court Clearly Abused its Discretion.

The three-judge district court clearly abused its discretion by: (1) not enjoining implementaion of unprecleared voting changes; (2) not enjoining utilization of a malapportioned plan as a Court-ordered interim remedy after finding the plan is unconstitutionally malapportioned; and (3) implementing a plan as a Court-ordered interim remedy that clearly violates § 2 of the

[3]Appellants would request that this Court issue an injunction and stay pending appeal to halt the scheduled general election until this Court could hear and decided the questions presented in this appeal.

Voting Rights Act of 1965, as amended.

This Court, just last term, held that § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election." *Clark v. Roemer,* supra, 111 S. Ct. at 2102. Appellants, here, put everyone on notice on August 26, 1991 that the district court's August 2, 1991 Order violated § 5 of the Voting Rights Act. Appellees did not seek preclearance of the changes then or thereafter. The district court abused its discretion in not enjoining the unprecleared voting changes with respect to the September 17, 1991 partisan primary elections.

And, this Court has held that "a court-ordered reapportionment plan of a state legislature ...must ordinarily achieve the goal of population equality with little more than de minimis variation." *Connor v. Finch,* 431 U. S. 407, 414 (1977). Court-ordered reapportionment plans must also comply with the requirements of § 2 of the Voting Rights Act. *Edge v. Sumter County School Dist.*, supra at 1510. These rules must be followed, particularly, when the court itself fashions, implements, or orders a remedy. See *Upham v. Seamon,* 456 U. S. 37, 43 (1982); *Jeffers v. Clinton,* supra; *Jordan v. Winter,* supra at 1142; *Edge v. Sumter County School Dist.*, supra at 1510. The lower court abused its discretion by ignoring this clear precedent. And, the district court abused its discretion by ignoring Mississippi State policy concerning reapportionment. The State Legislature had adopted, as policy, criteria that no reapportionment plan exceed 10% deviation and no reapportionment plan dilute minority voting strength. This Court has instructed lower courts to follow state policy, in fashioning remedies, especially when those policies do not conflict with the United States Constituion or federal statutory law. See *Upham v. Seamon,* supra; *Chapman v. Meier,* 420 U. S. 1 (1975); *Swann v. Adams*, 385 U.S. 440 (1967). The lower court, in the instant case, exceeded the parameters set by this Court in ordering or fashioning interim remedies. It was a clear abuse of discretion for the lower court to do so, especially when constitutionally and statutorily alternatives which followed state policy was presented to the court. See *Connor v. Finch,* supra.

B. Appellants are Entitled to a Preliminary Injunction Under § 2 of the Voting Rights Act

The three-judge district court should not have ordered, as a court-ordered interim remedy, a plan that clearly violates § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C 1973. See *Edge v. Sumter County School Dist.*, supra; *Jeffers v. Clinton,* supra; *Upham v. Seamon,* supra. As such, appellants were entitled to an injunction prohibiting the implementation of the racially dilutive plan as a court-ordered plan.

C. The Election Law Changes Contained in the District Court's August 2, 1991 Order Reflect Policy Choices of the Elected Representatives of the People.

Voting changes recommended by political parties to a district court and subsequently adopted and implemented by the district court without alteration are subject to § 5 scrutiny. See *Berry v. Doles,* supra; *Dougherty County Board of Educ. v. White,* 439 U. S. 32 (1978); *Hathorn v. Lovorn,* 457 U. S. 255 (1982); *McDaniel v. Sanchez,* 452 U. S. 130 (1981). Those changes, having the potential for discrimination, must receive § 5 preclearance prior to being implemented. *Perkins v. Matthews,* supra. (See Juris. Stat., p. 12, n. 6 for potential for the discrimination contained in changes drafted by the political parties and recommended to the district court for incorporation into its Order scheduling elections).

There were no exigent circumstances which would have allowed the district court to deny appellants' request for a § 5 injunction. The district court cited candidates spending money and campaigning, voter confusion caused by delaying the elections, and the court's reluctance to order special elections as exigent circumstances for conducting the election under the malapportioned discriminatory plan. All of those agruments were advanced as exigent circumstances by the district court in *Clark v. Roemer,* supra, and this Court rejected them. The Court should, again, reject such unpersuasive arguments.

CONCLUSION

On the basis of the foregoing argument and authorities cited, the facts, arguments, and authorities citied in appellants' Jurisdictional Statement, this Court should stay and enjoin the general election scheduled for November 5, 1991, or in the alternative set those elections aside, and note probable jurisdiction and reverse and remand the orders and decisions of the three-judge district court with specific instructions to the district court. Because of issues raised under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, this Court should request the views of the United States from the Solicitor General.

Respectfully submitted,

DEBORAH A. McDONALD
P. O. Box 211
Fayette, MS 39069
(601) 786-8730

CARROLL RHODES*
P. O. Box 588
Hazlehurst, MS 39083
(601) 894-4323

JOHN L. WALKER
P. O. Box 22849
Jackson, MS 39225-2849
(601) 948-4589

WILBUR O. COLOM
406 Third Avenue North
Columbus, MS 39703-0866
(601) 327-0903

JOHN PARKER
P. O. Box 808
Jackson, MS 39205-0808
(601) 352-8443

MIKE SAYER
119 Theobald Street
Greenville, MS 38701
(601) 334-6827

DATE: OCTOBER 24, 1991
* COUNSEL OF RECORD